STATE OF MICHIGAN

COURT OF APPEALS

JOHANNA WOODARD, Individually and as Next Friend of AUSTIN D. WOODARD, a Minor, and STEVEN WOODARD,

Plaintiffs-Appellants,

v

JOSEPH R. CUSTER, M.D.,

Defendant-Appellee,

and

MICHAEL K. LIPSCOMB, M.D., MICHELLE M. NYPAVER, M.D., and MONA M. RISKALLA, M.D.,

Defendants.

UNPUBLISHED
October 21, 2003

No. 239868
Washtenaw Circuit Court
LC No. 99-005364-NH

JOHANNA WOODARD, Individually and as Next Friend of AUSTIN D. WOODARD, a Minor, and STEVEN WOODARD,

Plaintiffs-Appellants,

v

UNIVERSITY OF MICHIGAN MEDICAL CENTER,

Defendant-Appellee.

No. 239869
Court of Claims
LC No. 99-017432-CM

Before: Meter, P.J., and Talbot and Borrello, JJ.

BORRELLO, J. (*dissenting*).

I respectfully dissent from the opinion issued by Judge Talbot in this case.

Plaintiffs, on behalf of their minor son, brought an action for medical malpractice alleging that while their son Austin was in the care of defendants for retrosyncytial virus (RSV) bronchiolitis, he developed fractures in his right and left femurs. Plaintiffs pleaded that the negligence of defendants was based in part on defendants breaching the standard of care. Because their malpractice claims were initially based on this theory, plaintiffs produced an expert witness who was board certified in pediatrics. Defendant doctor in this case was board certified in pediatrics, pediatric critical care, and neonatology-perinatology. The trial court held that pursuant to MCL 600.2169(1)(a), plaintiffs' expert was not qualified to testify.

Thereafter, defendants brought a motion pursuant to MCR 2.116(C)(10) stating that in the absence of an expert witness, plaintiffs' case must fail as a matter of law. The trial court granted defendants' motion to dismiss. Plaintiffs then brought a motion for leave to amend their complaint pursuant to MCR 2.118(A)(2), claiming that the doctrine of res ipsa loquitur applied in this case. The trial court found that expert testimony was needed to prove res ipsa loquitur, and therefore, any amendment would be futile.

I conclude that the trial court abused its discretion in holding that plaintiffs' expert was not qualified to testify at trial pursuant to MCL 600.2169(1)(a). I further find that no expert testimony was required under the doctrine of res ipsa loquitur as applied to the facts in this case. Thus, I conclude that because the trial court premised its denial of its motion to amend on an erroneous determination that expert testimony was required, the trial court abused its discretion. I would therefore reverse and remand this matter to the trial court.

I. Issues Presented

The factual issue in this case concerns when and how Austin's femurs broke. Because the parties conceded at oral argument that there was no definitive evidence regarding how the injuries occurred, this case involves questions of fact that lie solely within the discretion of a jury. On appeal, plaintiffs present the following issues: was plaintiffs' expert qualified to testify, and is expert testimony necessary in a case where an infant is taken to a hospital for treatment of RSV bronchiolitis and somehow develops two broken femurs?

II. Plaintiffs' Expert Witness

In their initial complaint, plaintiffs alleged that defendants breached the standard of care owed to Austin by negligently placing a right arterial line and by leaving Austin lying on his left side too long after placing the left arterial line. Plaintiffs' expert witness was board certified in pediatrics. Defendant Custer was board certified in pediatrics, pediatric critical care, and neonatology-perinatology.

MCL 600.2169(1) provides in relevant part:

> (1) In an action alleging medical malpractice, a person shall not give expert testimony on the appropriate standard of practice or care unless the person is licensed as a health professional in this state or another state and meets the following criteria:

> (a) If the party against whom or on whose behalf the testimony is offered is a specialist, specializes at the time of the occurrence that is the basis for the action in the same specialty as the party against whom or on whose behalf the testimony is offered. However, if the party against whom or on whose behalf the testimony is offered is a specialist who is board certified, the expert witness must be a specialist who is board certified in that specialty.

In *Tate v Detroit Receiving Hosp*, 249 Mich App 212; 642 NW2d 346 (2002), this Court held that whether a witness is qualified to serve as an expert witness is within the trial court's discretion, and the trial court's decision in that regard is reviewed for an abuse of discretion. *Id*. at 215. In civil cases, an abuse of discretion is found only in extreme cases where the result is so palpably and grossly violative of fact and logic that it evidences a perversity of will, a defiance of judgment, or the exercise of passion or bias. *Dep't of Transportation v Randolph*, 461 Mich 757, 768; 610 NW2d 893 (2000); *Spalding v Spalding*, 355 Mich 382, 384-385; 94 NW2d 810 (1959). Thus, the first inquiry is whether the trial court abused its discretion by striking plaintiffs' expert witness.

Plaintiffs contend that because the cause of action in this case centers on the broken femurs Austin allegedly incurred while in defendants' care, their expert was qualified to testify because all that was needed was an expert in general pediatric care. Plaintiffs' expert testified that Austin's fractures could have occurred when defendants positioned him during the insertion of a femoral venous line, a femoral arterial line, or peripheral intravenous lines; when they intubated him; or when they otherwise maneuvered him. Some of these procedures were administered while Austin was in the pediatric intensive care unit at the University of Michigan hospital, and some were not. Both the time and the origin of the injuries are unanswered questions of fact.

Plaintiffs rely on this Court's statement in *Tate*, *supra*, that an expert's qualifications match every board certification that a defendant physician holds exactly. In *Tate*, we stated:

> Thus, where a defendant physician has several board certifications and the alleged malpractice involves only one of these specialties, § 2169 requires an expert to possess the same specialty as that engaged in by the defendant physician during the course of the alleged malpractice. [*Tate, supra* at 220.]

In this case, plaintiffs alleged that defendants committed malpractice when they improperly handled their child. Because nothing in the record requires the conclusion that the broken femurs occurred while defendants were practicing the specialty of intensive pediatric care, such a conclusion can only be reached through conjecture and speculation. The majority admits there is scant evidence regarding when the broken femurs occurred. In the absence of any direct proof regarding when the injury occurred, the trial court abused its discretion by concluding that an expert who was board certified in intensive pediatric care medicine was required.

Thus, I dissent because issues of fact should be decided by juries, not judges. To hold otherwise is to violate the Constitution's guarantee of a right to a trial by a jury. Thomas Jefferson understood that the litmus test of any democratic society was gauged by the degree to

which citizens are given the opportunity of self-government. This meant not only the right to vote, the right to petition the government for redress, but also the right of the populace to sit as jurors. "I consider [trial by jury] as the only anchor ever yet imagined by man, by which a government can be held to the principles of its constitution." Thomas Jefferson to Thomas Paine, 1789. ME 7:408, Papers 15:269. "[The people] are not qualified to judge questions of *law,* but they are very capable of judging question of *fact.* In the form of juries, therefore, they determine all controverted matters of fact, *leaving thus as little as possible*, merely the law of the case, to the decision of the judges." Thomas Jefferson to Abbe Arnoux, 1789. ME 7:422, Papers 15:283 (emphasis added). For the trial court in this matter to have decided that the specialty in question was needed necessarily means that the trial court decided an issue of fact, thereby usurping the role of the jury.

III. Necessity of Expert Testimony under the Doctrine of Res Ipsa Loquitur

Our Courts have long harbored suspicion about the necessity of experts and their true value to juries. In 1874, our Supreme Court held in *People v Morrigan*, 29 Mich 4, 7 (1874), that:

> The experience of courts with the testimony of experts has not been such as to impress them with the conviction that the scope of such proofs should be extended. Such testimony is not desirable in any case where the jury can get along without it; and is only admitted from necessity, and then only when it is likely to be of some value. [*Id*.]

Eighty years later, our Supreme Court in *Higdon v Carlebach*, 348 Mich 363, 374 n *; 83 NW2d 296 (1957), commenting on the conclusion reached in *Morrigan*, *supra*, stated, "It is as true today as it was in 1874." Despite years of warnings from our Courts, our Legislature, by enacting MCL 600.2169, necessitated the use of expert witnesses in medical malpractice cases in all but a limited number of instances.

After the trial court dismissed this action, plaintiffs moved to amend their complaint to assert negligence under the doctrine of res ipsa loquitur. Plaintiffs also moved for a determination regarding whether expert testimony was required considering the facts that had been presented thus far. Plaintiffs argued that there was circumstantial evidence that entitled them to a presumption of negligence. Defendants argued that laypersons could not conclude that this type of injury could have occurred only from defendants' negligence, so expert testimony was necessary to establish that the femur fractures were the result of a breach of the standard of care concerning the manner in which an infant should be handled. The trial court concluded that expert testimony was needed, reasoning that the case involved "medical procedures and the application of those procedures, which information is not within the common knowledge and observation of a reasonably prudent jury." Therefore, citing futility, the court denied plaintiffs' motion to amend.

To prove a medical malpractice claim, a plaintiff must establish the following four factors: (1) the applicable standard of care, (2) breach of that standard of care by the defendant, (3) injury, and (4) proximate causation between the alleged breach and the injury. *Locke v*

Patchman, 446 Mich 216, 222; 521 NW2d 786 (1994). As a general rule, expert testimony is required in medical malpractice cases to establish the applicable standard of care and to demonstrate that the defendant somehow breached that standard. *Birmingham v Vance*, 204 Mich App 418, 421; 516 NW2d 95 (1994), citing *Bahr v Harper-Grace Hosps*, 198 Mich App 31, 34; 497 NW2d 526 (1993).

Nonetheless, there are two relevant exceptions to this rule:

> Where the negligence claimed is "a matter of common knowledge and observation," no expert testimony is required. *Daniel v McNamara*, 10 Mich App 299, 308; 159 NW2d 339 (1968). And, where the elements of the doctrine of res ipsa loquitur are satisfied, negligence can be inferred. *Neal v Friendship Manor Nursing Home*, 113 Mich App 759; 318 NW2d 594 (1982). [*Thomas v McPherson Center*, 155 Mich App 700, 705; 400 NW2d 629 (1986).]

Our Supreme Court in *Jones v Poretta*, 428 Mich 132, 150-151; 405 NW2d 863 (1987) adopted the doctrine of res ipsa loquitur when it stated:

> Whether phrased as res ipsa loquitur or "circumstantial evidence of negligence," . . . it is clear that such concepts have long been accepted in this jurisdiction. The time has come to say so. We, therefore, acknowledge the Michigan version of res ipsa loquitur which entitles a plaintiff to a permissible inference of negligence from circumstantial evidence.
>
> The major purpose of the doctrine of res ipsa loquitur is to create at least an inference of negligence when the plaintiff is unable to prove the actual occurrence of a negligent act. According to Prosser & Keeton, Torts (5th ed), § 39, p 244, in order to avail themselves of the doctrine, plaintiffs in their cases in chief must meet the following conditions:
>
> (1) the event must be of a kind which ordinarily does not occur in the absence of someone's negligence; . . . .
>
> (2) it must be caused by an agency or instrumentality within the exclusive control of the defendant;
>
> (3) it must not have been due to any voluntary action or contribution on the part of the plaintiff. [*Id*.; see also *Wischmeyer v Schanz*, 449 Mich 469, 484 n 29; 536 NW2d 760 (1995).]

Additionally, our courts have recognized that expert witnesses are not needed in cases where the lack of professional care is so manifest or egregious that a layman could determine the issue of negligence by resorting to common knowledge and experience. See *Roberts v Young*, 369 Mich 133, 138; 119 NW2d 627 (1963); *Murphy v Sobel*, 66 Mich App 122, 124; 238 NW2d 547 (1975); *Burton v Smith*, 34 Mich App 270, 272; 191 NW2d 77 (1971); *Haase v DePree*, 3

Mich App 337, 346; 142 NW2d 486 (1966). For instance, where an instrument is left inside a patient after surgery, no expert testimony is required. *Taylor v Milton*, 353 Mich 421, 425-426; 92 NW2d 57 (1958); see also *Higdon, supra* at 374-376 (the defendant dentist drilled on a patient's tongue); *Whinchester v Chabut*, 321 Mich 114, 119; 32 NW2d 358 (1948); *LeFaive v Asselin*, 262 Mich 443, 446; 247 NW2d 911 (1933); *Ballance v Dunnington*, 241 Mich 383, 387-388; 217 NW 329 (1928) (the plaintiff suffered severe burns due to X-ray over-exposure); *Loveland v Nelson*, 235 Mich 623, 624-625; 209 NW 835 (1926) (the defendant dentist injected Lysol into a patient's gums, mistaking it for anesthetic); *Howard v Park*, 37 Mich App 496, 502; 195 NW2d 39 (1972) (the plaintiff suffered severe lacerations from a cutting wheel during removal of a leg cast).

In those cases, the courts determined that expert testimony was not a prerequisite to recovery because whether the acts in question were careless and not in accord with standards of good practice in the community was within the common knowledge and experience of the lay jurors. Likewise here, I find that where a child presented to the hospital for RSV bronchiolitis and developed two broken femurs, the doctrine of res ipsa loquitur applies and expert testimony is unnecessary.

Additionally, because we are bound to view the evidence in the light most favorable to the non-moving party, and because defendants presented no contrary evidence, the inference must be granted to plaintiffs that Austin's femurs were healthy at the time of admission. In fact, because Austin was undisputedly admitted to the hospital for treatment of RSV bronchiolitis and not for treatment of his legs, this case is analogous to the fact pattern set forth in *Higdon, supra.*

In *Higdon, supra* at 366-367, a patient was having dentistry performed when the defendant's drill slipped and cut her tongue. Relying upon numerous cases from other jurisdictions, our Supreme Court held that a jury may infer negligence from "lay proof" in cases where "healthy and undiseased parts of the body requiring no treatment are injured during the professional relationship, under circumstances where negligence may legitimately be inferred." *Id.* at 374-376.

In this case, Austin presented to the hospital to be treated for RSV bronchiolitis and subsequently sustained two broken femurs. A lay person can understand that RSV bronchiolitis is not connected to broken femurs and can infer negligence. Expert testimony is not necessary when an injury occurs to a healthy and undiseased body part that did not require treatment. *Higdon, supra* at 374-376. Viewing the evidence in the light most favorable to the nonmoving party, Austin's injuries were to parts of his body which at the time of admission we must infer were healthy and undiseased. I therefore find our Supreme Court's ruling in *Higdon* controlling. Accordingly, the trial court erred when it held that expert testimony was required.

IV. Plaintiffs' Right to Amend Their Complaint

The last issue presented on appeal is whether the trial court erred when it denied plaintiffs' motion for leave to amend their complaint. Reviewing this issue for an abuse of discretion, *Dowerk v Oxford Charter Twp*, 233 Mich App 62, 75; 592 NW2d 724 (1998), I conclude that because the trial court erroneously held that expert testimony was required, it abused its discretion by denying plaintiffs' motion.

MCR 2.118(A)(2) provides that leave to amend a pleading "shall be freely given when justice so requires." Further, "[i]f a trial court grants summary disposition pursuant to MCR 2.116(C)(8), (C)(9), or (C)(10), the court must give the parties an opportunity to amend their pleadings pursuant to MCR 2.118, unless the amendment would be futile." *Doyle v Hutzel Hosp*, 241 Mich App 206, 212; 615 NW2d 759 (2000).

In this case, the trial court found that amendment would be futile because of an incorrect assertion that plaintiffs had to produce expert testimony to support their claims against defendants. In *Doyle*, *supra* at 220, this Court concluded that where a court's finding of futility is based on a faulty premise, the court's denial of the motion to amend the complaint constitutes an abuse of discretion. Having found that the trial court based its decision to deny plaintiffs the right to amend their complaint on a faulty premise, I would find that the trial court abused its discretion. I would therefore reverse the ruling of the trial court on all issues presented and remand this matter to the trial court for further proceedings in accordance with this decision.

/s/ Stephen L. Borrello